Petition

No. 81-2004

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILIP PALM,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the seizure by government agents of the petitioner's briefcase, and its subsequent search after petitioner had been released and when there was no expectation of the presence of contraband, is an unlawful border seizure as contemplated in 19 U.S.C. § 482?

Whether the admission of lay opinion regarding the chemical composition of an unknown substance is an improper application of Fed. R. Evid. 701?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PHILIP PALM,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Philip Palm, respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on January 18, 1982. Petitioner's request in the court below for rehearing was denied February 26, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at F. 2d , (9th Cir. 1982) and appears as Appendix A hereto.

PARTIES BELOW

The names of all parties to this proceeding in the court of appeals appear in the caption of the case.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1982. On February 1, 1982, petitioner sought a rehearing. On February 26, 1982, the court of appeals denied rehearing. This petition for certiorari was timely filed within 60 days after the denial of the petition for rehearing pursuant to Rule 20 of the Rules of the Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fourth Amendment to the Constitution of the United States;

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

19 U.S.C. § 482:

"Any of the officers or persons authorized to board or search vessels may stop, search, and examine as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial."

Fed. R. Evid 701:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

STATEMENT OF THE CASE

Seizure and Search of the Briefcase

On July 30, 1980, Dennis T. Pielage ("Pielage") was arrested in Honolulu, Hawaii, as he attempted to smuggle heroin into the United States from Fiji. During a routine border search, an inspector detected heroin sewn under the inside lining of Pielage's briefcase. During the subsequent interrogation of Pielage, investigators found a piece of paper on which was written the name of Philip Palm ("Palm" or "the Petitioner"). Further investigation disclosed that Palm was due to arrive in Honolulu from Fiji on August 1, 1980.

On August 1, 1980, when Palm arrived in Honolulu, on a flight from Nandi, Fiji, he went through the preliminary customs check, afterwhich he was directed to the secondary station. There, inspectors searched his person, and a customs inspector and DEA agent took Mr. Palm's briefcase to another room where it was drilled, a technique used to locate substances hidden under linings. The agents found no contraband in the briefcase; however, they did observe about 200 pieces of paper.

After the drilling, Palm and the agents walked to the DEA office where a DEA agent questioned Palm about Pielage. Initially, Palm denied knowing Pielage; however, when told that Pielage said he knew Palm, the defendant admitted he knew Pielage and said he denied knowledge because he was afraid Pielage was in trouble.

The customs inspector completed his examination of Mr. Palm and told him that he was free to leave. The DEA agent then said that they were going to keep Palm's briefcase, whereupon the customs inspector concurred because he felt that retaining the briefcase would assist in the case against Pielage.

An agent escorted Palm through the airport to the gate from which he would board his flight to Los Angeles. Upon returning to the DEA office, the agent began to examine the contents of Palm's briefcase and came across a bluish, clear plastic folder. The agent testified that he noticed a white powdery residue on both the outer and inner covers of the folder, that he scraped this off with a knife and requested a police officer to obtain a Marquis reagent to test for heroin.

The police officer returned with a cobalt thiocyanate cocaine tester, into which the agent deposited the contents from his knife. He testified that he then noted blue specks in the test kit which to him indicated the presence of cocaine. In conducting this test, the DEA agent used all of the white powder.

In addition, during his search of the briefcase, the DEA agent found Palm's travel itinerary. Using that itinerary, the agent told the jury that Palm had traveled through Bangkok, Thailand, which the agent characterized as a "source city" for the purchase of drugs.

Prior to trial, Petitioner moved to suppress the use of any items or information obtained from his briefcase. The trial court denied that motion.

Opinion Testimony—DEA Agent

A DEA agent testified that, on August 1, 1980, while searching the contents of Palm's briefcase, he observed a white powdery residue on the cover of a plastic folder; that he scraped off all of the residue with a knife; that he and others processed it through a cobalt thiocyanate cocaine tester; that he observed little blue specks in the test kit; and that he did not send any of this substance to a chemist. In concluding this testimony the agent said that the ap-

pearance of blue specks means the presence of cocaine. On cross-examination, the agent contradicted himself and said that he did not testify that the substance tested for cocaine. The cross-examination proceeded as follows:

"Q. (Mr. Banks) But you said it tested for cocaine.

A. (Agent Snyder) No. I just said it gave a blue response.

Q. Indicating it could have been cocaine.

A. Or heroin.

Q. Or heroin. You don't know which.

A. I don't know which.

Q. So what you're saying is you don't know what it was but you think it was one or the other.

A. That's correct."

In short, Agent Snyder was not sure what the substance was.

The procedure followed by Agent Snyder with regard to the residue found in the defendant's briefcase is to be contrasted with his actions regarding the substance previously found in Pielage's briefcase and with the procedures followed by the DEA Chemist, Look. First, when the substance was found in Pielage's briefcase, it was secured, identified and sent to the chemist.

When the DEA Chemist received the substance, he undertook a procedure to identify it and determine its quality. After weighing the substance, he ran tests to determine whether it was cocaine or heroin. In other words, the chemist could not make that determination with certainty from observation. To be sure that the substance was in fact heroin, he ran both a micro-chemical and an infrared spectrophotometric test. Then, after determining that the substance was heroin, he ran a general gas chromo-

tography test to determine quality. Based upon these tests, he reported his conclusions to the DEA office in Honolulu.

On cross-examination, the chemist testified that, upon receiving the substance, he cut out four samples and ran tests on each. He further testified that an examination by way of a microscope can be conducted on very minute amounts of a substance and a determination could be made as to whether or not the substance is heroin or cocaine.

Opinion Testimony — Pielage

Related to the error in permitting the DEA agent to speculate regarding the nature of the powdery residue is the testimony of Pielage regarding a substance he smuggled into the United States in 1975. In an effort to show prior, similar misconduct by the petitioner, the government offered the totally uncorroborated testimony of Pielage that, in 1975, he smuggled cocaine into the United States and delivered it to Palm. The evidence that the substance was, in fact, cocaine consisted of the following:

"Q. (U.S. Attorney) What was in that package?

A. (Mr. Pielage) Cocaine.

Q. How do you know that?

A. Because I saw it unpacked.

MR. BANKS: I object to that, your Honor. If the Court please, I ask that that be stricken. That's a conclusion of the witness as to what it is.

THE COURT: Well, I think that's probably true unless he knows it when he sees it. That would be true. Sustained. It may be stricken unless there is a foundation laid.

Q. Mr. Pielage, have you ever taken cocaine?

A. I have tried it.

Q. Are you able to recognize it?

MR. BANKS: Object. Your Honor, this is a scientific test involved to determine these types of substances.

THE COURT: It goes to the weight, not to the admissibility. The objection is overruled.

• • •

Q. The question is, the first question I asked you was whether or not you have taken cocaine.

A. Yes, I have tried it.

Q. And you have had a reaction from it?

A. Yes, I have a sinus condition which is, when taking cocaine, I have an allergic reaction to.

Q. But you have seen it on many occasions?

A. Yes, I have.

Q. All right. And so this incident in 1975 when you saw the cocaine, did it appear to be cocaine to you?

A. Yes, sir.

MR. BANKS: I object to that, Judge.

THE COURT: I think he can testify that it appeared to be cocaine. Objection is overruled.

After having permitted Mr. Pielage speculate regarding the cocaine, the court appeared to retrench when the matter again came up in Mr. Pielage's testimony. The following occurred:

Q. (Mr. Weatherwax) "Did you in fact bring the box into the United States?

A. (Mr. Pielage) Yes, I did.

Q. What did you do with that box?

A. (Mr. Pielage) I went through Los Angeles and checked into the Marriott Hotel and waited for Mr. Palm to contact me.

Q. (Mr. Weatherwax) All right. And then what happened?

A. And then he came to my room and immediately opened the box and took a little bit of the coke out.

MR. BANKS: I object to the conclusion.

THE COURT: Well, at any rate, he took a little bit of something out.

THE WITNESS: Right."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW SANCTIONS UNINTENDED AND UNCONSTITUTIONAL EXTENSION OF THE GOVERNMENT'S POWER TO SEARCH AND SEIZE LUGGAGE AT A BORDER WHERE THE AGENTS SEIZE A BRIEFCASE AFTER THEY EXHAUSTED ALL EXPECTATIONS OF FINDING CONTRABAND AND WHERE THEY INTENDED TO CONDUCT A GENERAL SEARCH OF THE PAPERS CONTAINED IN THE BRIEFCASE.

A search or a seizure must be reasonable under the Fourth Amendment. *Ker* v. *California*, 374 U.S. 23, 83 S. Ct. 1623 (1963). Absent the normal requirements of a search warrant or the existence of probable cause, border searches still must be reasonable under the Fourth Amendment. *United States* v. *Hill*, 430 F. 2d 129, 130 (5th Cir. 1970); *Henderson* v. *United States*, 390 F. 2d 805 (9th Cir. 1967). 19 U.S.C. § 482 provides in part:

"Any of the officers or persons authorized to board or search vessels may . . . search any trunk or envelope, wherever found, in which he may have a reason-

> able cause to suspect there is merchandise which was imported contrary to law; and *if any such officer or other person . . . shall find* any merchandise on or about any such . . . trunk or envelope, which he shall have reasonable cause to believe . . . to have been unlawfully introduced into the United States, . . . he shall seize and secure the same for trial." (Emphasis supplied)

The history of this statute is succinctly set out in *United States* v. *Ramsey,* 431 U.S. 606, 616-9 (1976), where this Court concludes:

> "This long-standing recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself."

However, in *Ramsey,* supra. p. 618, fn. 13, this Court also noted that it was not deciding whether, and under what circumstances, a border search might be deemed unreasonable because of the particularly offensive manner in which it was carried out.

Petitioner has consistently argued that the government agents exceeded the authority given them under 18 U.S.C. § 482. Specifically, the agents seized petitioner's briefcase and its contents--being his personal papers—after two searches failed to uncover any contraband. This is a direct violation of the dictates of 18 U.S.C. § 482 which conditions seizure of a "trunk" or "envelope" upon the finding of contraband. In this case, the alleged traces of an undefined controlled substance were found after the seizure of the briefcase.

Secondly, the final search of the briefcase was a violation of 18 U.S.C. § 482 in that the object was not contraband, but evidence. The government's right to search and seize at the border without a warrant is limited to the

prevention of smuggling. *United States* v. *Thirty Seven Photographs,* 402 U.S. 363, 376 (1971); *United States* v. 12 200-*Ft. Reels of Film,* 413 U.S. 123, 125 (1973). In this case, it is clear that at the time of the final search, the agents had determined that petitioner did not possess contraband, and they undertook an inspection of Palm's private papers which were in the seized briefcase. It must be recalled that the agents had inspected the inside of the briefcase twice including a perusal of the contents, before the final search of the papers. One of the prior searches included a drilling to determine if any substance was concealed under the linings.

It must also be recalled that Palm was released by the agents—though his briefcase was retained—to catch a flight from Hawaii to California. Therefore, the agent must have felt that they did not have probable cause to arrest him.

Finally, it must be recalled that this last search was a reading of the private papers contained in the briefcase. Because this final search was general and investigative, it does not fall within the purview of 18 U.S.C. § 482, or any other inherent powers that the government may have to protect its borders and, therefore, the agents should have obtained a warrant.

The opinion of the court below fails to discuss these issues, and for that reason alone, this petition should be allowed. The court below first discusses the issue of the involvement of the DEA agent, with the Customs inspector and resolves it by citing *United States* v. *Schoor,* 597 F. 2d 1303, 1306 (9th Cir. 1979). However, the identity and organization of the agents was not the issue raised by the appeal. The issue, which remains unanswered, is the focus

of the search which had shifted from a search for contraband, to a search of private papers for evidence.

Petitioner is aware of the few cases where the issue of contraband vis a vis evidence is discussed. *Maquire* v. *United States,* 396 F. 2d 327 (9th Cir. 1968); *United States* v. *Schoor,* 597 F. 2d 1303 (9th Cir. 1979). However, in each of these, contraband was the object of the questioned search which uncovered evidence of other crimes. In this case, contraband was no longer the object of the questioned search.

The court below next discusses the question of the bifurcation of the search, and resolves the matter by holding that "the second" search was a continuing border search. The court below undertakes a time and distance analysis which completely misses the point.

As noted above, the real issues are:

1. Was the seizure without having found contraband valid?
2. By reason of the shifting of the object of the search from contraband to evidence of criminal involvement, must a warrant be obtained?

In this regard, petitioner would analogize his position at the time that he was released to that of the traveler in an airport who has been subjected to an investigative stop. In those instances, seizures—whether of persons, *Dunaway* v. *New York,* 442 U.S. 200 (1979); *Brown* v. *Illinois,* 422 U.S. 590 (1975);—or of objects, *United States* v. *Place,* 660 F. 2d 44, 50 (2nd Cir. 1981), for investigative purposes have been declared unconstitutional. See also: *United States* v. *Brodzik,* 366 F. Supp. 295, 297 (W.D. N.Y. 1973).

These issues have not, as yet, been addressed by this Court and are properly presented within the context of this

case. Furthermore, the court below has failed to address these questions and, therefore, review by this Court is necessary.

II.

THE DECISION BELOW IMPROPERLY SANCTIONS THE ADMISSION OF LAY OPINION TESTIMONY REGARDING THE CHEMICAL COMPOSITION OF AN UNKNOWN SUBSTANCE AND THEREBY DANGEROUSLY BROADENS THE SCOPE OF FED. R. EVID. 701 IN NARCOTIC PROSECUTIONS.

Opinion Testimony-Pielage and DEA Agent

As noted above, the trial court permitted both Pielage and a DEA agent to testify to opinions that a white, powdery substance was either cocaine or heroin. The court below held that such opinion testimony was properly admitted into evidence under Fed. R. Evid. 701.

Fed. R. Evid. 701 provides for the admission of lay opinions if the opinions are rationally based upon the perception of the witnesses. Fed. R. Evid. 702 provides for the admission of expert testimony when the witness has been qualified. Opinions regarding the nature of a questioned substance are limited to qualified experts. *United States* v. *Haro-Espinso,* 619 F. 2d 789 (9th Cir. 1979); *United States* v. *Luschen,* 614 F. 2d 1164 (8th Cir. 1980); cert. den. 100 S. Ct. 2161. To permit an agent to testify to an opinion which cannot be impeached because the questioned substance has been used, or to permit a smuggler to render a lay opinion under Fed. R. Evid. 701 unnecessarily and dangerously broadens the scope of that rule.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PHILIP PALM,
Defendant-Appellant.

No. 81-1225
D.C. No. 80-01159
MEMORANDUM

Appeal from the United States District Court for the District of Hawaii
Samuel King, District Judge, Presiding
Argued and submitted October 21, 1981

Before: ALARCON, POOLE and FERGUSON, Circuit Judges

Philip Palm appeals his conviction of distributing heroin in violation of 21 U.S.C. § 959 and of causing another individual to import heroin in violation of 21 U.S.C. § 952(a), § 960(a)(1), and 18 U.S.C. § 2(b). We affirm.

Palm first contends that the seizure and search of his briefcase was not a lawful border search because it was conducted by a Drug Enforcement Agency agent. We do not agree. The search was conducted by customs officials with DEA agents assisting them. A border search under the aegis of a customs official is not invalidated by the presence of DEA agents. *See United States* v. *Schoor,* 597 F. 2d 1303, 1306 (9th Cir. 1979), *United States* v. *Carter,* 592 F. 2d 402, 405 (7th Cir.), *cert. denied,* 441 U.S. 908 (1979).

Palm also argues that the second search of his briefcase was not a border search and therefore required a warrant. This argument is also without merit. The entire search and questioning of Palm was completed within seventy minutes. During this time, customs officials never relinquished the briefcase to Palm. The second search conducted at the airport *was a continuing border search* and therefore did not require a search warrant. *See United States* v. *Ramsey*, 431 U.S. 606, 616-20 (1977), *United States* v. *Rodriguez*, 592 F. 2d 553, 556 (9th Cir. 1979). Customs officials may allow a suspect to leave and subsequently conduct a valid border search. *See e.g., United States* v. *Espericueta-Reyes*, 631 F. 2d 616, 619 (9th Cir. 1980); *United States* v. *Smith*, 629 F. 2d 1301 (9th Cir. 1980).

Palm next argues that the trial judge improperly admitted certain testimony. Agent Snyder's testimony regarding the substance found in Palm's briefcase and Dennis Pielage's testimony regarding the substance allegedly smuggled into the country in 1975 were both lay opinion testimony founded on personal knowledge and observation, and were properly admitted into evidence under Fed. R. Evid. 701.

Palm contends that Pielage's testimony regarding the courier from South America was inadmissible hearsay. Assuming that admission of this testimony was error, it was harmless. Customs officials found heroin in Pielage's briefcase. At trial, Pielage gave extensive and detailed testimony concerning the agreement between Palm and Pielage to smuggle the heroin from Fiji. For the jury to have convicted Palm they must have believed Pielage's testimony regarding the present smuggling agreement. Pielage's testimony concerning a prior smuggling trans-

action probably did not add to his credibility and therefore did not contribute to the conviction.

Palm's final contention is that the evidence against him was insufficient to support his conviction. As noted above, customs officials found heroin in Pielage's suitcase. Pielage gave extensive and detailed testimony regarding the planning and effectuation of their smuggling scheme. The eveidence in the record, when taken in the light most favorable to the prosecution, supports the conviction. *See Jackson* v. *Virginia,* 443 U.S. 307, 318-19 (1979), *United States* v. *Witt,* 648 F. 2d 608, 611 (9th Cir. 1981).

AFFIRMED.

Opposition

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a search of petitioner's briefcase conducted by a Customs officer, assisted by a DEA agent, upon petitioner's arrival in the United States on an international flight constituted a legitimate customs inspection.

2. Whether the district court properly admitted in evidence opinion testimony that an otherwise unidentified substance was a narcotic.

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In the Supreme Court of the United States

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PHILIP PALM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1982. A petition for rehearing was denied on February 26, 1982. The petition for a writ of certiorari was filed on April 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of his pretrial motion to suppress evidence, petitioner was convicted by a jury sitting in the United States District Court for the District of Hawaii of distribution of heroin intended for unlawful importation into the United States, in violation of 21

U.S.C. 959; and of causing an accomplice to distribute unlawfully imported heroin and to possess a controlled substance, in violation of 21 U.S.C. 952(a) and 960(a)(1) and 18 U.S.C. 2(b). He was sentenced to concurrent terms of 15 years' imprisonment and three years' special parole. The court of appeals affirmed.

1. The evidence developed during a pretrial suppression hearing and at trial established that in May 1980 petitioner visited Dennis Pielage in Palm City, Florida and enlisted him to assist in smuggling drugs into the United States by concealing them in the lining of a briefcase.[1] They agreed to meet in Fiji, where they would exchange matching briefcases. Pielage would then bring the briefcase given to him by petitioner into the United States, and the two would meet in Los Angeles, California, where petitioner would receive the briefcase and pay Pielage $7,000 for his services (Tr. 64–69).[2] To effectuate the scheme, petitioner gave Pielage expense money to purchase airline tickets and a briefcase. Pielage then flew to Fiji where on July 29, 1980 he met petitioner in his hotel room and they exchanged briefcases (Tr. 67–68, 72–73, 78–87). The following day, Pielage arrived at the Honolulu International Airport with the briefcase that petitioner had given him. During a customs inspection, a Customs officer discovered a quantity of heroin secreted in the lining of the bottom of the briefcase (Tr. 90–91), and a piece of paper bearing petitioner's name and the telephone number of a female acquaintance (H. Tr. 8–9). Customs officials telephoned the woman and checked the passenger manifest of incoming flights, learning that petitioner would be arriving later that night (H. Tr. 10).

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[1] Pielage, who entered a plea of guilty to attempted importation of drugs, was the government's principal witness at trial.

[2] References to "Tr." denote the trial transcript; "H. Tr." denotes the suppression hearing transcript.

As expected, petitioner, carrying a black briefcase identical to Pielage's, arrived on a flight from Fiji shortly after midnight and was met by a Customs officer who escorted him to a "primary" customs area. After a Treasury Enforcement Communications Systems (TECS) computer check registered a "hit", which indicated petitioner's prior involvement in criminal activity, he was taken to a "secondary" customs area, where the Customs officer, assisted by a DEA agent, inspected the briefcase and observed that its corner had been pulled apart and reglued. However, when the officers punctured the lining of the bag with a drill they did not detect the presence of drugs (H. Tr. 12–13, 15–16, 26).

Petitioner was then taken to a DEA office, where he initially denied but later admitted knowing Pielage[3] (H. Tr. 16–17, 28). Acting on the suggestion of the DEA agent, the Customs officer decided to retain petitioner's briefcase but to permit petitioner, who by then had been detained approximately one hour, to catch a connecting flight to Los Angeles (H. Tr. 15, 17–18, 29). The Customs officer explained at the suppression hearing that this was necessary because he "wasn't finished examining it" (H. Tr. 29), and because it was of apparent evidentiary value in a drug importation case involving both petitioner and Pielage (H. Tr. 19–20).

Following petitioner's departure, the Customs officer and the DEA agent renewed their inspection of the briefcase. While searching its contents, the DEA agent observed a white powder residue on a blue plastic folder (H. Tr. 13–14). The agent scraped the residue off the folder and, by conducting a field test for drugs, determined that it was cocaine or heroin (H. Tr. 13–14; Tr.

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[3] Petitioner explained that his initial denial was prompted by his fear that Pielage was in trouble and his desire not to become involved (H. Tr. 17).

156–157). The inspection of the briefcase and the folder also revealed the presence of a passport and a trip itinerary prepared by a travel agency (Tr. 155).

Following denial of petitioner's motion to suppress the contents of the briefcase (H. Tr. 46), the district court admitted into evidence testimony concerning both the narcotic residue found on the folder and the travel documents found in the briefcase (Tr. 155–156).

2. The district court denied petitioner's motion to suppress the contents of the briefcase concluding that, notwithstanding the pause in the search and the participation of a DEA agent assisting the Customs inspector, the second phase of the search of petitioner's briefcase constituted a permissible warrantless border search conducted for the specific purpose of interdicting unlawful importation of contraband rather than for general law enforcement purposes (H. Tr. 40–43).[4] At trial the court permitted testimony concerning both the narcotics residue found on the folder and the travel documents found in the briefcase (Tr. 155–156).

On appeal petitioner argued that the second phase of the search of his briefcase was impermissible because the border search had ended when nothing was found in drilling into the lining and he was permitted to go on his way, and because of the participation of a DEA agent. Petitioner also asserted several errors in the admission of evidence, most importantly the admission of the DEA agent's testimony, based upon the field test he had administered, that the substance found on the folder recovered from petitioner's briefcase was either cocaine or heroin. Finally, petitioner asserted that the evidence was insufficient to support his conviction.

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[4] The court concluded in the alternative that the second phase of the search was supported by probable cause and exigent circumstances (H. Tr. 43–45).

The court of appeals affirmed. The court held that a "border search under the aegis of a customs official is not invalidated by the presence of DEA agents" (Pet. App. A1) and that "[t]he second search conducted at the airport *was a continuing border search* and therefore did not require a search warrant" (*id.* at A2; emphasis in original).[5] The DEA agents' testimony and other challenged testimony were both properly admitted into evidence pursuant to Fed. R. Evid. 701 as lay opinion testimony founded upon personal knowledge and observation, the court held (Pet. App. A2).[6] Finally, the court held that petitioner's conviction was amply supported by the evidence, which included Pielage's testimony implicating petitioner in the attempted importation of the heroin found in Pielage's briefcase (*id.* at A3).

ARGUMENT

1. Petitioner contends (Pet. 9–12) that the trial judge was required to grant his motion to suppress evidence found in his briefcase because Customs officers exceeded their statutory authority by detaining the briefcase for further examination while allowing his departure from the airport and by thereafter renewing a search of its contents. More specifically, he argues that 19 U.S.C. 482 authorizes the seizure of containers by Customs officers only following the discovery of contraband; thus, the detention of his briefcase for further examination following the initial inspection, which failed

[5] The court noted (Pet. App. A2) that "[t]he entire search and questioning of Palm was completed within seventy minutes. During this time customs officials never relinquished the briefcase to Palm."

[6] The court also held (Pet. App. A2–A3) that admission of Pielage's testimony to the effect that petitioner had sent a courier who had supplied him with cocaine which he had delivered to Palm on an earlier occasion was harmless error, if error at all.

to reveal the presence of contraband, is alleged to have constituted an unlawful seizure. This claim was properly rejected by the court below.

a. 19 U.S.C. 482 authorizes a Customs officer to

> search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer * * * shall find any merchandise on or about any such * * * trunk or envelope, which he shall have reasonable cause to believe * * * to have been unlawfully introduced into the United States * * * [to] seize and secure the same for trial.

It is settled law in the courts of appeals that the failure of Customs officers, acting within the purview of this statute, initially to detect the presence of contraband in personal belongings does not preclude them from conducting a second search of the property while it is within the immediate vicinity of the border crossing point. See, *e.g.*, *United States* v. *Flores*, 594 F.2d 438, 439 (5th Cir. 1979); *Government of Canal Zone* v. *Eulberg*, 581 F.2d 1216, 1218 (5th Cir. 1978) (collecting cases). As the court explained in *Eulberg*, quoting *United States* v. *Warner*, 441 F.2d 821, 832–833 (5th Cir.), cert. denied, 404 U.S. 829 (1971), "a person [and his belongings are] not immune from further examination by Customs agents 'merely because he may momentarily escape detection and pass safely through the first Customs check.'" It is fully permissible for Customs officials to maintain custody over personal belongings long enough to enable them to conduct secondary examinations for contraband that they may have overlooked during their initial inspection. By contrast with the seizure for trial or forfeiture proceedings of property found to contain contraband, referred to in Section 482, such temporary detentions for investigative purposes

are simply an incident of the authority to enforce the customs laws by conducting inspections at international points of entry. See, *e.g.*, *United States* v. *Flores*, *supra*, 594 F.2d at 439 (warrantless secondary search of automobile by Customs officers for drugs 10 days after initial customs search, which revealed a quantity of heroin, was a valid customs search); *Government of Canal Zone* v. *Eulberg*, *supra*, 581 F.2d at 1218 (customs search of van more than a week following its initial search and detention by Customs officers was a valid border search under 19 U.S.C. 482).[7] Here, as the Customs officer who conducted the second search explained during the suppression hearing (H. Tr. 29), petitioner's briefcase was retained simply because the officer

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[7] Disposition of this petition need not await this Court's decision in *United States* v. *Place*, cert. granted, No. 81-1617 (June 7, 1982). The question presented in *Place*—whether the police may detain luggage for exposure to a drug detecting dog where there is suspicion not amounting to probable cause that it contains narcotics—does not involve a detention of luggage incident to a customs search. Petitioner's reliance upon *Dunaway* v. *New York*, 442 U.S. 200 (1979); and *Brown* v. *Illinois*, 422 U.S. 590 (1975), is misplaced for the same reason. Both cases involve investigative detentions of persons on the basis of suspicion not amounting to probable cause; neither concerned the detention of luggage at an international border for the purpose of continuing a customs search.

Petitioner's suggestion (Pet. 11) that by permitting him to go on his way the Customs inspector revealed his view that probable cause to arrest was lacking is both unfounded and irrelevant. First, the existence of probable cause to arrest petitioner is not in issue. Second, probable cause is not required for a border search. *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). Finally, there can be no requirement that law enforcement agents exercise at all times the maximum legally justifiable restraint upon persons suspected of involvement in crime. That petitioner was not held is no indication at all that he could not have been detained for a reasonable time pending completion of the border search.

"wasn't finished examining it * * *." Because the ensuing search conducted at the airport was a continuing border search, the incidental detention was proper.

b. Nor do the facts support petitioner's related argument (Pet. 4, 10–12) that the examination of his briefcase, which revealed traces of narcotics, was in excess of the Customs officer's authority to conduct border searches because its objective was the discovery of additional evidence against Pielage rather than discovery of contraband imported in violation of the customs laws. In view of the appearance of the briefcase—its similarity to Pielage's briefcase and its reglued cover, as well as petitioner's false statement that he did not know Pielage, the Customs officers and DEA agents and ample reason to suspect that it contained narcotics which they had overlooked. The Customs officer who authorized the detention and supervised the second search of the briefcase stated that he took these measures to "help prove that * * * Pielage and [petitioner] were involved in illegal importation of * * * controlled substance[s]" (H. Tr. 20). He made no suggestion, however, that the inspection would not embrace a search for controlled substances themselves. Instead he explained that, in light of the events that followed the initial drill search, he concluded that the first examination was too cursory and that a more complete customs search was required (H. Tr. 29).[8]

c. Finally, there is no merit to petitioner's contention (Pet. 11) that the search of his briefcase was unreasonably intensive because it embraced a reading of his personal papers. First, this argument was raised neither in

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[8] Petitioner errs in stating (Pet. 11) that, prior to the second search, Customs officials had concluded that he did not possess contraband. The clear implication of the Customs officer's testimony is that the continued search was to locate drugs that may have been missed during the initial inspection.

the district court (see note 9, *infra*) nor in the court of appeals and may not be entertained here. Second, the record simply does not supply a factual predicate for this claim. It is apparent from the testimony of the DEA agent who assisted in the search of the briefcase that resulted in the discovery of petitioner's passport and trip itinerary, that the documents were simply observed at some point during the inspection of its contents.[9] "[W]here customs officers are authorized to search for material * * * introduced illegally into the United States and they discover the instrumentalities or evidence of crimes, they may seize the same." *United States* v. *Schoor*, 597 F.2d 1303, 1306 (9th Cir. 1979) (footnote omitted), citing *Maguire* v. *United States*, 396 F.2d 327, 330 (9th Cir. 1968), cert. denied, 393 U.S. 1099 (1969). In any event, where, as here, there is reason for Customs officials to suspect that papers in the possession of a person whose belongings are subject to inspection relate to the smuggling of contraband, they may examine the documents. See *United States* v. *Grayson*, 597 F.2d 1225, 1228–1229 (9th Cir.), cert. denied, 444 U.S. 875 (1979).[10]

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[9] During the pretrial suppression hearing no testimony was developed as the extent to which petitioner's personal papers were examined or as to how or when the passport and itinerary were discovered. Indeed, petitioner never specifically addressed the suppression of the documents. At trial, during cross examination, the DEA agent testified that he "went through" the papers in petitioner's briefcase during the customs search of its contents (Tr. 166). Nothing in the record supports petitioner's claim that the inspection involved a systematic "reading of the private papers contained in the briefcase" (Pet. 11).

[10] Documents in Pielage's briefcase linked him with petitioner. It would be logical for Customs officials to suspect that papers in petitioner's briefcase might connect him with Pielage and corroborate his involvement in the drug smuggling operation.

2. Petitioner also claims (Pet. 13–14) that the trial judge erred in permitting non-expert opinion testimony that certain chemical substances were cocaine or heroin.

a. At trial, the DEA agent who discovered the white powder residue on the plastic folder in petitioner's briefcase testified that, after scraping the substance off with a knife, he exposed it to a reagent from a cobalt thiocyante cocaine tester kit. The agent observed a blue crystalline reaction which, he stated, indicated the presence of cocaine or heroin. The agent's testimony establishes that he had received special training at the Treasury Department Law Enforcement School in the field testing of unknown substances for the presence of narcotics and had additional on-the-job experience (Tr. 156–159, 168).[11]

There is no merit to petitioner's claim (Pet. 13) that, because the DEA agent was not a trained chemist, the trial judge improperly admitted his conclusion that the powdery residue taken from the packet was a narcotic.[12] Where, as here, a DEA agent's opinion testimony concerning the presence of an unlawful drug is based upon his professional education and his on-the-job experience in analyzing drug samples, it is not an abuse of discretion to admit such testimony. See *United States* v. *Haro-Espinosa*, 619 F.2d 789, 795 (9th Cir. 1979); *United States* v. *Bermudez*, 526 F.2d 89, 97–98 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); *United*

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[11] The agent also testified that, following the field test, no residue was left for further analysis at a laboratory (Tr. 156).

[12] The DEA agent's inability to testify definitively that the white powder found in petitioner's briefcase was cocaine rather that heroin was the result of the inability of the test that he performed to discriminate between the two substances, not his lack of training (see Tr. 168). As petitioner was not charged with possession of the drug in his briefcase, the agent's inability to distinguish between the two substances was inconsequential.

States v. *Hampton*, 507 F.2d 832, 836 (8th Cir. 1974), aff'd, 425 U.S. 484 (1976); see also, *United States* v. *Lam Lek Chong*, 544 F.2d 58, 71 (2d Cir. 1976), cert. denied *sub nom. Liganoza* v. *United States*, 429 U.S. 1101 (1977).[13] Admission of the agent's testimony was accordingly proper either under Fed. R. Evid. 702, or, as the court of appeals concluded, under Fed. R. Evid. 701.

b. At petitioner's trial Pielage, who appeared as a government witness, testified that during 1975 petitioner had sent him as a courier to Tahiti to receive a quantity of cocaine and import it into the United States. Pielage explained that he had used cocaine on occasion. Based upon his familiarity with the drug, Pielage was allowed to testify that the substance which he conveyed for petitioner appeared to be cocaine (Tr. 93–95). The trial judge did not err in admitting this testimony. Under Fed. R. Evid. 702 a witness qualified as an expert by knowledge or personal experience may present pertinent opinion testimony, and it is within a trial judge's discretion under this rule to admit the testimony of an experienced drug user or courier that a particular substance is, in fact, contraband. See *United States* v. *Atkins*, 473 F.2d 308, 313–314 (8th Cir.), cert. denied, 412 U.S. 931 (1973) (collecting cases). In any event, the

[13] We note that the DEA agent technically did not testify to his opinion as to the identity of the substance removed from the blue folder on direct examination. Instead, he simply reported his observation of the results of the field test he had conducted—a blue crystalline reaction (Tr. 159). He had previously testified, in general terms, that such a reaction was indicative of the presence of cocaine. Petitioner's counsel had objected earlier, when the agent was initially asked the result of the field test (Tr. 157). After a foundation for the agent's testimony was laid (Tr. 157–159), however, the agent reported his observation without any further objection. The agent stated a direct conclusion respecting the identity of the contraband only upon cross-examination by petitioner's counsel (Tr. 167–168).

court of appeals' conclusion that Pielage's testimony was properly admitted as lay opinion testimony under Fed. R. Evid. 701 is plainly correct. Here, Pielage, who had explained that he had used cocaine and had seen it on other occasions, was properly permitted to testify that the substance that he had smuggled on petitioner's behalf in 1975 had the appearance of cocaine (Tr. 95).[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[14] This testimony was not introduced to establish criminal liability for petitioner's role in the 1975 transaction, for which he was not charged. Rather, it was intended to help establish petitioner's intent and knowledge by cementing the links between petitioner, Pielage, and unlawful drug trafficking. Where evidence of uncharged crimes is introduced for such purposes, it is unnecessary to establish commission of the unlawful act beyond a reasonable doubt; it is sufficient that evidence of the uncharged crimes be clear and convincing. See *United States* v. *Burchinal*, 657 F.2d 985, 993 (8th Cir.), cert. denied, 454 U.S. 1086 (1981) (collecting cases). In view of Pielage's testimony that the substance he transported for petitioner had the physical appearance of cocaine and the circumstances under which he received it, the clear and convincing evidence standard was satisfied here. See *United States* v. *Atkins*, *supra*, 473 F.2d at 314 (character of illegal substance may be proven by circumstances of its sale and disposition); accord, *United States* v. *Lawson*, 507 F.2d 433, 439 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).